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The Effect of Illegal Abductions by Law Enforcement Officials on Personal Jurisdiction

THE EFFECT OF ILLEGAL ABDUCTIONS BY LAW ENFORCEMENT OFFICIALS ON PERSONAL JURISDICTION

During the past several years, the increase in worldwide drug smuggling operations has resulted in a corresponding increase in the kidnapping of suspects by law enforcement authorities of the United States and other countries for the purpose of acquiring jurisdiction.[1] This trend indicates that a question exists whether a court may or should exercise jurisdiction over the person of a defendant who was illegally apprehended and forcibly abducted into the jurisdiction to face criminal charges.

The recent cases of *United States v. Toscanino*[2] and *United States ex rel. Lujan v. Gengler*[3] addressed themselves to this issue. In *Toscanino,* the defendant, a citizen of Italy, was convicted in the District Court for the Eastern District of New York of conspiracy to violate the narcotics laws of the United States.[4] On his appeal of the conviction, Toscanino alleged that jurisdiction was acquired over his person in an illegal manner, thus vitiating the conviction.[5] The defendant claimed that American agents had illegally wiretapped his telephone and kidnapped him in Uruguay, then tortured him and abducted him to the United States to stand trial. The government did not respond to these allegations in the district court, claiming that they were immaterial to the question of jurisdiction.[6]

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1. New York Times, Jan. 5, 1974, at 25, col. 6; *id.*, Dec. 13, 1973, at 2, col. 5; *id.*, Oct. 17, 1973, at 14, col. 5. *See generally* Scott, *Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud,* 37 MINN. L. REV. 91 (1953) [hereinafter cited as Scott, *Criminal Jurisdiction*]. In order for a criminal conviction to be valid, the accused must normally be tried in the state in which the alleged crime was committed. Note, *Effect of Illegal Abduction into the Jurisdiction on a Subsequent Conviction,* 27 IND. L.J. 292 (1952) [hereinafter cited as *Illegal Abduction*]; Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law,* 28 AM. J. INT. L. 231 (1934).

2. 500 F.2d 267, *petition for rehearing en banc denied,* 504 F.2d 1380 (2d Cir. 1974).

3. 510 F.2d 62 (2d Cir. 1975).

4. Toscanino was convicted of conspiracy to import narcotics into the United States, in violation of 21 U.S.C. §§ 173, 174 (1970). The government alleged, by way of the testimony of one Caramian, a co-conspirator, that Toscanino agreed in the summer of 1970 for him to find buyers for a shipment of heroin bound for the United States to be delivered by another conspirator, Nicolay. Upon finding buyers for the shipment, Caramian received part of the heroin from Toscanino delivered by Nicolay in Miami. This shipment was intercepted by government agents. Toscanino denied any knowledge of these transactions.

5. 500 F.2d at 268.

6. *Id.* at 270. The appellate court disagreed, holding that Toscanino was entitled to invoke 18 U.S.C. § 3504 (1970), requiring the government to affirm or deny the "unlawful act" of eavesdropping and electronic surveillance by the United States in Uruguay, on the ground that the wiretapping was a violation of the fourth amendment. Toscanino was not, according to the court, entitled to the statement if

On the basis of two Supreme Court cases, *Ker v. Illinois*[7] and *Frisbie v. Collins*,[8] the district court held that the manner in which Toscanino was brought into the territory of the United States did not affect the court's jurisdiction over him, provided "he was physically present at the time of trial."[9]

On appeal, the United States Court of Appeals for the Second Circuit held that Toscanino's allegations, if true, would strip the district court of jurisdiction, and remanded the case for a hearing in which the government would be required to affirm or deny Toscanino's allegations of illegal conduct.[10] The court based its conclusion as to divestment of jurisdiction on two grounds: first, the due process clause required a court to refrain from exercising jurisdiction over a defendant who has been kidnapped and forcibly brought within the jurisdiction; second, the seizure of the defendant in violation of the sovereignty of Uruguay, and consequently in violation of the charters of the United Nations and the Organization of American States, coupled with Uruguay's condemnation of the seizure of Toscanino,[11] permitted the defendant to invoke the violations for his individual benefit.

United States ex rel. Lujan v. Gengler[12] involved a situation similar to *Toscanino*, except that no torture or other inhumane conduct was involved.[13] In *Lujan*, the defendant was indicted by a federal grand jury as a con-

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based solely on the grounds of the federal statute on wiretapping and eavesdropping, 18 U.S.C. § 2510 *et seq.* (1970), as that statute is inapplicable outside the United States. 500 F.2d at 279–81. For a discussion of the fourth amendment's extraterritorial application to unlawful wiretapping abroad, *see* 88 HARV. L. REV. 815, 823–24 (1975).

7. 119 U.S. 436 (1886). *Ker* involved an international kidnapping and abduction. The court held that no constitutional right had been violated, as the due process clause only guaranteed fairness at trial. The circumstances by which the court acquired presence of the defendant were held not to impair the court's right to try a person for a crime. For an extended discussion of *Ker; see* notes 24–32 and accompanying text *infra*.

8. 342 U.S. 519 (1952). Unlike *Ker, Frisbie* involved an interstate seizure. But like *Ker*, the court answered Frisbie's due process argument by stating that due process is satisfied if the defendant is accorded a fair trial. For an extended discussion of *Frisbie, see* notes 33–39 and accompanying text *infra*.

9. 500 F.2d at 271.

10. 18 U.S.C. § 3504 (1970) requires the government to answer allegations by the defendant of governmental misconduct in violation of the defendant's statutory or constitutional rights. The court remanded the case to the district court to adjudicate both the wiretapping claim and the allegations of torture and illegal abduction. The court held that Toscanino was entitled to an evidentiary hearing with respect to his allegation of forcible abduction only if, in response to the government's denial, he offered some credible supporting evidence, including specifically, evidence that the operation was undertaken by or at the direction of United States officials. 500 F.2d at 279, 281.

11. *Id.* at 270.

12. 510 F.2d 62 (2d Cir. 1975).

13. *Id.* at 66.

spirator in the same plan to smuggle narcotics into the United States as was charged to Toscanino. A warrant was issued for Lujan's arrest, and was executed in "an unconventional manner";[14] Lujan, a licensed pilot, alleged that he was hired by one Duran to fly him from Argentina to Bolivia, and when the plane landed in Bolivia, Lujan was seized by Bolivian police acting as American agents. He was held for several days in Bolivia, and then placed aboard a plane flying to the United States. There was no allegation by Lujan that he was physically mistreated while in Bolivia, but he did contend that he was not permitted to communicate with anyone.

Lujan sought a writ of habeas corpus, arguing that the court was required to divest itself of jurisdiction over him because he was kidnapped by American agents into the United States, thereby violating the charters of the United Nations and of the Organization of American States.[15] The Second Circuit rejected the argument, stating that Argentina's failure to protest his abduction precluded his raising of an international law violation, and that the treatment accorded him during his abduction from Argentina to the United States was not sufficiently reprehensible for application of the holding in *Toscanino*.[16] Thus, the Supreme Court's holdings in *Ker* and *Frisbie* controlled.[17] As a result of the *Lujan* decision, the Second Circuit severely limited the parameters of *Toscanino* to require divestment of jurisdiction only in cases of illegal abduction in which the government engaged in "torture, brutality or . . . similar physical abuse."[18]

The Second Circuit's interpretation of *Toscanino* in *Lujan* does not comport with the broad statements contained in the former opinion. *Toscanino* appeared to hold that divestment of jurisdiction was constitutionally required when the defendant's presence in the jurisdiction was procured through deliberate misconduct in violation of constitutional provisions, and the sovereignty of a foreign nation which the United States had, by treaty, pledged to respect. The opinion did not give great weight to the presence of torture in the case.[19] It appears that *Lujan*, in distinguishing *Toscanino* solely on the basis of torture and similar reprehensible conduct, incorrectly gauged the thrust of the opinion. As the later pronouncement upon the question, however, *Lujan* must govern any conflict between the two cases.[20]

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14. *Id.* at 63.

15. *Id.* at 63, 66.

16. *Id.* at 69.

17. *Id.* at 69 (concurring opinion). *See* notes 7 and 8 *supra.*

18. 510 F.2d at 69 (concurring opinion). The *Toscanino* opinion was written by Judge Mansfield and joined in by Judge Oakes, with Judge Anderson writing a separate concurring opinion. The *Lujan* opinion was written by Chief Judge Kaufman joined in by Judge Oakes with Judge Anderson again writing a separate concurring opinion.

19. If torture were the only factor relevant to divest the court of jurisdiction, Toscanino would not have had to mention the fourth amendment. 500 F.2d at 275.

20. It appears that the seeming reversal of the court's holding within such a short time may have been based on the views of the remaining judges on the Second

Even to the extent that *Toscanino* and *Lujan* are interpreted as holding that a court should not exercise jurisdiction over a defendant when his presence was acquired through kidnapping and abduction coupled with torture, these decisions are still at variance with the rule accepted since 1886,[21] that the right of a court to try a person will not be questioned as long as he was found within its territorial jurisdiction and detained under lawfully issued process.[22] This note will explore the erosion of this rule due to the changing notions of due process of law, both in the state and federal courts. Further, the issue of whether violation of international treaties can be invoked as an alternative means to divest the court of jurisdiction over the defendant will be discussed.

THE *Ker-Frisbie* RULE

The line of cases establishing that the jurisdiction of a court to try a criminal defendant was not affected by the manner of seizure began with *Ker v. Illinois*.[23] In *Ker*, the defendant was wanted for theft in Illinois and the Governor requested the Secretary of State of the United States to issue a warrant requesting Ker's extradition[24] by the Executive of the Republic of Peru, in compliance with a treaty between the United States and Peru on that subject.[25] The American agent, with papers in hand,

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Circuit. Judge Anderson, who concurred in both *Toscanino* and *Lujan*, stated that the denial of the motion for rehearing en banc in *Toscanino* was predicated on a "narrow" reading of the holding:

> . . . the majority [voting to deny the rehearing] obviously interpreted the decision in *Toscanino* as resting solely and exclusively upon the use of torture and other cruel and inhumane treatment of Toscanino in effecting his kidnapping and it rejected the proposition that a kidnapping of a foreigner from his own or another nation and his forcible delivery into the United States against his will, but without torture, would itself violate due process.

510 F.2d at 69 (concurring opinion).

21. *See* Ker v. Illinois, 119 U.S. 436 (1886). Since the *Ker* decision, most courts have not viewed any pre-trial events as affecting jurisdiction. *See, e.g.*, United States v. Russell, 411 U.S. 423 (1973).

22. Pettibone v. Nichols, 203 U.S. 192 (1906); *In re* Johnson, 167 U.S. 120 (1896). *See also* Lascelles v. Georgia, 148 U.S. 537 (1893); Cook v. Hart, 146 U.S. 183 (1892); Annot., 18 A.L.R. 509 (1922); Annot., 56 A.L.R. 260 (1928); Annot., 165 A.L.R. 947 (1946).

The rule articulated in *Ker* was first applied to state cases, and therefore the Supreme Court ruled solely on constitutional issues. In *Toscanino*, the court buttressed its contrary conclusion by noting that the federal courts may be held to stricter than constitutional standards by the inherent supervisory power of appellate courts over federal district courts. 500 F.2d at 277.

23. 119 U.S. 436 (1886).

24. Extradition has been defined as "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." Terlinden v. Ames, 184 U.S. 270, 289 (1902).

25. Treaty with Peru on Extradition, 18 Stat. part 3, 719 (1875).

instead of following through with the extradition procedures, forcibly abducted Ker to the United States.[26] As a result of this irregular procedure, Ker contended that his rights under the due process clause of the fourteenth amendment were violated[27] and that by virtue of the treaty with Peru, he was entitled to a right of asylum there.[28] Both arguments were rejected by the Supreme Court, which held that due process of law was complied with if the party was properly indicted and he was deprived of no rights to which he was lawfully entitled *at the trial.*[29] The Court, in holding that no constitutional right had been violated, simply concluded that the abduction was a "mere irregularity" in the manner in which Ker was brought into custody and thus was insufficient to divest the state court of jurisdiction.[30]

The Court further held that the abduction without the consent of the Government of Peru did not in itself violate the extradition treaty between that country and the United States. Ker had argued that by virtue of the treaty he acquired, by his residence in Peru, a right of asylum unless properly extradited, a right which he could assert in the United States courts. The Court, in rejecting this contention, stated that no treaty on extradition had ever given an individual the right to escape justice. The Court distinguished between the right of Peru to refuse extradition and thus voluntarily give Ker a right of asylum, and his right to insist upon security in such asylum.[31] The Court asserted that Peru could have lawfully surrendered Ker to Illinois even in the absence of a formal extradition request.[32]

Sixty-six years later, in *Frisbie v. Collins,*[33] the Supreme Court reiterated that forcible abduction of a defendant did not violate the due process clause of the fourteenth amendment. *Frisbie* involved an interstate, rather than an international, kidnapping. While Frisbie was living in

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26. 119 U.S. at 438.

27. *Id.*

28. *Id.* at 441.

29. *Id.* at 440.

30. *Id.* The Court stated that there might be some cases where it would be appropriate to look at pre-trial conduct by the authorities as violative of due process; however:

> [F]or mere irregularities in the manner in which he may be brought into custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment. *Id.* at 440.

31. *Id.* at 443. An extradition treaty simply gives the legal right to the signing states to demand extradition and the correlative duty to surrender. Factor v. Laubenheimer, 290 U.S. 276, 287 (1933). Therefore, an extradition treaty eliminates other methods of apprehension only if it expressly so provides. *Accord,* United States v. Unverzagt, 299 F. 1015 (W.D. Wash. 1924) (Defendant had no right of asylum in Canada which would require a United States court to divest itself of jurisdiction due to his abduction from that country).

32. 119 U.S. at 442.

33. 342 U.S. 519 (1952).

Illinois, Michigan police forcibly seized, handcuffed, blackjacked, and abducted him to Michigan to face trial for murder.[34]

In a petition for a writ of habeas corpus, Frisbie claimed that his conviction was a nullity because his abduction violated the due process clause of the fourteenth amendment and the Federal Kidnapping Act.[35] The court of appeals reversed the district court's denial of relief, on the grounds that the Federal Kidnapping Act embodied a strong federal policy against forcible abductions, and that no state could convict a defendant who was seized in violation of the Act's provisions.[36] On certiorari, the Supreme Court reversed, holding that the sanctions set forth in the Federal Kidnapping Act were the exclusive remedies for its violation, and that only Congress could legitimately add to them.[37] On the question of a violation of the due process clause, the Supreme Court stated:

> This Court has never departed from the rule announced in Ker v. Illinois . . . that the power of a court to try a person for crime is not

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34. 342 U.S. at 520. There is an interstate extradition procedure specified in the United States Constitution:

> A person charged in any state with Treason, Felony, or other crimes, who shall flee from Justice, and be found in another State shall on demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U.S. CONST. art. IV, § 2 cl. 2. *See also* 18 U.S.C. §§ 3181 *et seq.* (1970). There can be problems with this method of apprehension of fugitives as the process can be slow and cumbersome, the governor may refuse to act, and the offense may not be extradictable.

The Fugitive Felon Act, 11 U.S.C. § 1073 (1970), authorizes federal agents to return fugitives to the federal judicial district of the site of the crime for federal prosecution.

35. 18 U.S.C. § 1201 (1970). The Act provides in pertinent part:

> a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor by a parent thereof, shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

18 U.S.C. § 1201(a) (1970). This code section was amended in 1972 to extend "the jurisdictional base to include acts committed within the special maritime, territorial, and aircraft jurisdiction of the United States, and to include acts committed against foreign officials and official guests, and struck out provisions relating to death penalty." Comment to 18 U.S.C. § 1201 (1970) *as amended* (Supp. III, 1973).

The reliance on the Federal Kidnapping Act by Frisbie was an attempt to avoid the holding in *Ker* that similar treatment in an international abduction was not a violation of due process. *See* notes 23–32 and accompanying text *supra.*

36. Collins v. Frisbie, 189 F.2d 464, 468 (6th Cir. 1951).

37. 342 U.S. at 523. *See also The Supreme Court, 1951 Term,* 61 HARV. L. REV. 89, 126–27 (1952). In Mahon v. Justice, 127 U.S. 700 (1888), a criminal defendant argued that U.S. CONST. art. IV, § 2 (*see* note 34 *supra*), prohibited the trial of

> impaired by the fact that he had been brought, within the court's jurisdiction by reason of a "forcible abduction." No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after being fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards.[38]

Both *Ker* and *Frisbie* involved Supreme Court review of the conduct of state law enforcement officers, but the same doctrine has been applied by lower federal courts to cases involving abduction by federal officers. The argument that federal officers should be held to a higher standard of conduct than state officers had been uniformly rejected.[39]

JUSTIFICATIONS FOR THE *Ker-Frisbie* RULE

The *Ker-Frisbie* rule's justification lies in the notion that a balance must be struck between conviction of the guilty and deterrence of misconduct by law enforcement authorities. Since *Frisbie* was decided, the concept of reversing criminal convictions because of pre-trial official misconduct has gained wide acceptance. It remains to be determined whether this development has undercut the basis for *Ker-Frisbie*.

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anyone who was abducted into the jurisdiction in violation of the extradition procedure set forth therein. In *Mahon,* the defendant was taken to Kentucky from West Virginia over the protest of the Governor of West Virginia. The Court held that the extradition clause only bound the surrendering state to accede to the wishes of the demanding state, and did not affect the jurisdiction of any courts of the former. 127 U.S. 705.

The construction by the Supreme Court of the Federal Kidnapping Act in *Frisbie* was wholly consistent with this reasoning in *Mahon. Accord,* Lascelles v. Georgia, 148 U.S. 537 (1893). *See generally* Scott, *Criminal Jurisdiction, supra* note 1.

38. 342 U.S. at 522 (footnote omitted).

39. "While the court recognizes that the vitality of the Ker-Frisbie doctrine we follow may be in doubt and that federal officers might be held to a higher standard of conduct than their state counterparts, we will not strike it down." United States v. Cotten, 471 F.2d 744, 748 n.11 (9th Cir. 1973). Since *Mahon,* federal courts have uniformly declined to hold that a violation of a statute by federal law enforcement authorities divests them of jurisdiction. *See* Robinson v. United States, 144 F.2d 392 (6th Cir. 1944) (Removal Act, 18 U.S.C. § 591 (1970)); *Ex parte* Lamar, 274 F. 160 (2d Cir. 1921) (same); United States *ex rel.* MacBlain v. Burke, 200 F.2d 616 (3d Cir. 1952) (Interstate Compact Act, 61 PURDON'S PA. STAT. ANN. § 321 (Supp. 1951)). *See also* United States v. Hamilton, 460 F.2d 1270 (9th Cir. 1972) (international abduction by Canadian border officers); United States *ex rel.* Calhoun v. Twomey, 454 F.2d 326 (7th Cir. 1971) (interstate abduction).

The *Toscanino* opinion did not distinguish between the constitutional requirements of official behavior by state and federal officers, but did rely on the general supervisory power of a federal appellate court to require district courts to adhere to a standard more rigorous than the constitutional minimum in the area of illegal abductions. The validity of this pronouncement of policy, however, is very doubtful in view of *Lujan. See* note 22 *supra.*

The *Ker-Frisbie* rule may be justified on the grounds that the defendant has suffered no harm by his abduction, and that only the state whose sovereignty has been invaded has really been injured.[40] In *Mahon v. Justice*,[41] however, the Governor of West Virginia requested the release of a criminal defendant by the Commonwealth Act of Kentucky after his abduction from West Virginia. The Governor, arguing that it was the duty of the United States to secure each state's territorial sovereignty from kidnappings perpetrated by other states, petitioned the United States District Court for Kentucky to afford the only means of compelling Mahon's return, a writ of habeas corpus. The Supreme Court, reversing the grant of the writ, ruled that there was no provision for compulsory return of a person unlawfully abducted but held pursuant to lawful process for offenses against the state to which he was abducted. It seems, therefore, that the *Ker-Frisbie* rule applies even where the sovereign whose rights are violated demands the return of the defendant, and that both the defendant and the injured state are without remedy.[42]

The primary justification for the *Ker-Frisbie* rule is that the act of escaping from the jurisdiction by the defendant does not purge the offense.[43] As stated in *Frisbie* "[t]here is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice . . . ."[44] According to the Supreme Court interpretation of the due process clause at the time of both *Ker* and *Frisbie*, the defendant's rights were adequately safeguarded if, after jurisdiction was obtained, customary and fair procedures were employed. Due process was, under this theory, only concerned with constitutional violations which had a prejudicial effect upon

40. The only right denied by illegal abduction would be a formal extradition hearing which does not inquire into the merits of the charge, but only establishes that the person matches the one sought to be removed and that he has fled the demanding state. Thus, if the defendant has indeed fled the demanding state, he has lost nothing as a result of the abduction. *See Illegal Abduction, supra* note 1, at 299.

41. 127 U.S. 700 (1888). *See also* note 37 *supra*.

42. 1952 WASH. U.L.Q. 588, 589. *See also* State v. Brewster, 7 Vt. 118, 122 (1835). *Mahon* involved an interstate abduction only, and the court held that the protest of the aggrieved state could not be redressed in federal court, as there was no federal remedy. 127 U.S. at 705. However, in *Lujan*, the Second Circuit noted that an international abduction might affect the jurisdiction of a court if the foreign state protested. This statement supported the finding in *Toscanino* that an abduction in violation of international law might be redressed by the federal courts under their supervisory power. 500 F.2d at 278. *Lujan* specifically held, however, that the failure of the foreign government to protest the abduction was fatal to the defendant's claim. 510 F.2d at 67.

After *Lujan*, it is still unclear whether the abduction of the defendant in violation of international law, without any violation of individual rights, is sufficient to divest the court of jurisdiction. *See* notes 117–140 and accompanying text *infra*.

43. This seems to be the defendant's biggest stumbling block. *See* Mahon v. Justice, 127 U.S. 700, 711 (1888). *See also* Scott, *Criminal Jurisdiction, supra* note 1, at 97; Note, *Criminal Law — Personal Jurisdiction Obtained by Kidnapping*, 5 U. FLA. L. REV. 434 (1952) [hereinafter cited as *Personal Jurisdiction*].

44. 342 U.S. at 522.

the guilt-determinative procedure of the trial.[45] With this policy in mind, it was clear that *Ker* and *Frisbie* decided that the abduction of a criminal defendant was not material to the fairness of the trial and thus irrelevant to the requirements of due process.[46] Under the *Ker-Frisbie* analysis, there is no justification for allowing pre-trial irregularities to void a conviction unless the fairness of the guilt-determinative process is tainted thereby.[47]

Another justification which has been advanced in favor of the *Ker-Frisbie* rule is that the act of abduction should not deprive the state of the right to try the defendant because the abduction was beyond the scope of the officers' authority, and therefore not attributable to the state.[48] In civil cases, jurisdiction over the defendant is not impaired by conduct other than the plaintiff's; by analogy, the argument runs, the state's power should only depend on its own actions. However, the officers who engage in the unlawful activities are officials of the state, and the state cannot act except through such individuals.[49]

The infelicity of this justification is most apparent in the area of searches and seizures, where the courts have uniformly held that evidence

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45. *Id.* The view that the manner of acquiring jurisdiction before trial was not to be scrutinized under due process was based on the assumption that there was no danger of convicting an innocent defendant. Violations of procedural rights during trial and violations that affected the reliability of evidence were long viewed as vital to the determination of guilt, and were scrutinized under due process. *See, e.g.,* Powell v. Alabama, 287 U.S. 45 (1932). *See also* Scott, *Criminal Jurisdiction, supra* note 1. *But see* note 88 and accompanying text *infra; Personal Jurisdiction, supra* note 43.

46. "Occurrences prior to the trial which did not enter in any way into his conviction are wholly beside the point." United States *ex rel.* Langer v. Ragen, 237 F.2d 827, 829 (7th Cir. 1956). *See* Sheldon v. Nebraska, 401 F.2d 342 (8th Cir. 1968); Baxter v. Rhay, 268 F.2d 40, 44 (9th Cir. 1959) (held that the violation of a local ordinance requiring that a prisoner must be brought before a magistrate without unnecessary delay was not constitutionally required in state proceedings as the absence of this procedure did not affect the outcome); United States *ex rel.* Sprosch v. Ragen, 246 F.2d 264, 265 (7th Cir. 1957); United States *ex rel.* Burgess v. Johnson, 323 F. Supp. 72, 75 (E.D. Mich. 1971); Golla v. Rhodes, 162 F. Supp. 589 (D. Del. 1958). *See also* Pettibone v. Nichols, 203 U.S. 192 (1906). *See generally Illegal Abduction, supra* note 1.

47. *See* United States *ex rel.* Orsini v. Reincke, 286 F. Supp. 974 (D. Conn. 1968).

48. *See* United States *ex rel.* Voight v. Toombs, 67 F.2d 744 (5th Cir. 1933).

49. In civil cases, the generally accepted rule is that "[a] state will not exercise judicial jurisdiction, which has been obtained by fraud, or unlawful force, over a defendant or his property." RESTATEMENT (SECOND) OF CONFLICTS § 82 (1971). It would seem that if a court will not exercise jurisdiction over a non-resident defendant brought into a state by the unlawful force or fraud of the plaintiff, it ought not to exercise jurisdiction in a criminal case over a defendant who is brought into the state by the unlawful force or fraud of the state's law enforcement agents. It is true that no constitutional requirement mandates this result in civil cases, but the greater importance of individual rights affected when the criminal process is invoked by the state indicates that constitutional strictures might wisely be placed on the state's misconduct. *See generally* Comment, *Jurisdiction Over Persons Brought into a State by Force or Fraud,* 39 YALE L.J. 889 (1930).

obtained as a result of an illegal search is inadmissible without regard to whether the state itself authorized the search.[50] It is difficult to see why the state should be forced to bear the burden of its officers' wrongdoing in an illegal search, but not in an illegal abduction.

The strength of the *Ker-Frisbie* rule has been demonstrated by the application of the rule to situations other than those involving illegal abductions.[51] The rule has been cited for the proposition that the circumstances surrounding any arrest within the jurisdiction are immaterial to the court's exercise of power.[52] Using the same justification as that of the *Ker-Frisbie* rule, it has been held that if the defendant is brought before a proper officer, by proper authorities, to answer for a crime, he cannot assert a violation of due process simply because he was arrested without a warrant or previous complaint,[53] or after an illegal confinement.[54] Similarly, the principle of the *Ker-Frisbie* rule has been applied to irregularities in the procedure used in the extradition of a defendant.[55] Expectedly, the *Ker-*

50. Mapp v. Ohio, 367 U.S. 643 (1961). *See also* Weeks v. United States, 232 U.S. 382 (1914).

51. The *Ker-Frisbie* rule has been applied in support of a federal court's jurisdiction over proceedings for forfeiture of smuggled goods, despite the fact that the seizure by federal authorities was unlawful. United States v. Eight Boxes, Etc., 105 F.2d 896, 899 (2d Cir. 1939).

52. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 158 (1923) (arrest improper because it lacked probable cause); Guzman-Flores v. United States Imm. and Nat. Serv., 496 F.2d 1245 (7th Cir. 1974); Sewell v. United States, 406 F.2d 1289, 1292 (8th Cir. 1969); McCord v. Henderson, 384 F.2d 135, 136 (6th Cir. 1967); Evans v. United States, 325 F.2d 596, 602 (8th Cir. 1963) (warrant issued in violation of F.R. Crim. P.); Vlissidis v. Anadell, 262 F.2d 398, 400 (7th Cir. 1959); United States v. King, 335 F. Supp. 523, 553 (S.D. Calif. 1971); Deivease v. Cox, 327 F. Supp. 652, 655 (W.D. Va. 1971); Howard v. Allgood, 272 F. Supp. 381, 384 (E.D. La. 1967); Crawford v. Cox, 307 F. Supp. 732, 736 (W.D. Va. 1962) (arrest without a warrant); Frye v. Settle, 168 F. Supp. 7, 11 (W.D. Miss. 1958) (failure to require appearance before a U.S. Commissioner before appearance in U.S. District Court); Virgin Islands v. Carrero, 139 F. Supp. 275, 278 (D.V.I. 1955) (illegal arrest without a warrant for a misdemeanor not committed in the presence of the officer, defect held to be cured by trial).

53. United States v. Washington, 253 F.2d 913, 916 (7th Cir. 1958).

54. Delana v. Crouse, 327 F.2d 693 (10th Cir. 1964). The court in *Delana* held that illegal confinement unaccompanied by the obtaining of evidence later admitted against the defendant does not vitiate a conviction. The court stated that although related to the manner in which jurisdiction was obtained, *Frisbie* stood for the more general proposition "that precharge seizure, control and detention by state authorities does not in itself provide grounds for relief in federal court." *Id.* at 694.

55. United States v. Caramian, 468 F.2d 1370 (5th Cir. 1972); United States *ex rel.* Calhoun v. Twomey, 454 F.2d 326, 328 (7th Cir. 1971) (failure to comply with pre-return hearings under the Uniform Criminal Extradition Act, Iowa Code Ann. § 759.10 (1950)); Bacon v. United States, 449 F.2d 933 (9th Cir. 1971); Tynan v. Eyman, 371 F.2d 764, 766 (9th Cir. 1967); Nance v. Paderick, 368 F. Supp. 547, 550 (W.D. Va. 1973) (deprivation of counsel at the extradition proceedings); United States *ex rel.* Hunt v. Russell, 285 F. Supp. 765, 767 (E.D. Pa. 1968) (failure to provide counsel at hearing before being returned under the United States-Bolivia extradition treaty).

Frisbie rule has been held applicable to all situations involving kidnappings,[56] notwithstanding the fact that the defendant had escaped from prison or violated probation of another state,[57] was abducted from another jurisdiction's jail,[58] was fraudulently induced to waive extradition,[59] or that his presence was secured by deception or trickery.[60] Historically, therefore, it is clear that the *Ker-Frisbie* rule has been widely accepted and applied to situations outside the strict facts of the two cases. It has been stated that the rule is so well accepted that it is not open to question.[61]

ATTACKS ON THE *Ker-Frisbie* RULE

In more recent years, however, the principal rationale behind the *Ker-Frisbie* doctrine has been questioned and significantly eroded. Some contend that the rule itself is still applied only because of its historical acceptance.[62] The question which is sharply raised after *Toscanino* and *Lujan*

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56. United States v. Vicars, 467 F.2d 452, 455 (5th Cir. 1972); United States *ex rel.* Kelley v. Maroney, 414 F.2d 1228 (3d Cir. 1969); Bullis v. Hocker, 409 F.2d 1380, 1382 (9th Cir. 1969); Hobson v. Crouse, 332 F.2d 561 (10th Cir. 1964); Cook v. Kern, 330 F.2d 1003 (5th Cir. 1964); Hanovich v. Sacks, 290 F.2d 799 (6th Cir. 1961); Devine v. Hank, 287 F.2d 687 (10th Cir. 1961); Overman v. United States, 281 F.2d 497, 500 (6th Cir. 1960); United States *ex rel.* Moore v. Martin, 273 F.2d 344, 345 (2d Cir. 1959); Ragavage v. United States, 272 F.2d 197 (5th Cir. 1959); Hardy v. United States, 250 F.2d 580, 582 (8th Cir. 1959); United States *ex rel.* Master v. Baldi, 198 F.2d 113, 116 (3d Cir. 1952); Crow v. Coiner, 323 F. Supp. 555, 557 (N.D. W.Va. 1971); Johnson v. Buie, 312 F. Supp. 1349, 1351 (W.D. Miss. 1970); Hinkle v. Lowe, 309 F. Supp. 487 (E.D. Ark. 1969); United States *ex rel.* Taylor v. Barmiller, 199 F. Supp. 115 (E.D. Pa. 1961); Ryan v. Tinsley, 182 F. Supp. 130 (D. Colo. 1959); Crawford v. Lydick, 179 F. Supp. 211, 214 (W.D. Mich. 1959); Smith v. Mosier, 148 F. Supp. 638, 639 (W.D. Mich. 1957); Pebley v. Knotts, 95 F. Supp. 683, 686 (N.D. W.Va. 1951); Hatfield v. Warden of State Prison of Southern Michigan, 88 F. Supp. 690, 692 (E.D. Mich. 1950); United States v. Insull, 8 F. Supp. 310 (N.D. Ill. 1934).

57. Strand v. Schmittroth, 251 F.2d 590, 600 (9th Cir. 1957); United States *ex rel.* Humphries v. Hunt, 15 F. Supp. 608, 611 (W.D.N.Y. 1936).

58. Bistram v. United States, 253 F.2d 610, 613 (8th Cir. 1958).

59. Blankenship v. Peyton, 295 F. Supp. 16 (W.D. Va. 1969); United States *ex rel.* Cooper v. Reincke, 219 F. Supp. 733, 738 (D. Conn. 1963).

60. Pettibone v. Nichols, 203 U.S. 192 (1906). *See* Scott, *Criminal Jurisdiction, supra* note 1.

61. Sheehan v. Huff, 142 F.2d 81 (D.C. Cir. 1944); *Ex parte* Lopez, 6 F. Supp. 342 (S.D. Tex. 1934). *See* Gerstein v. Pugh, 420 U.S. 103, 119 (1975).

62. In the recent case of United States v. Edmons, 432 F.2d 577 (2d Cir. 1970), Judge Friendly stated:

> We do not find *Frisbie* . . . and its predecessors . . . to be a truly persuasive analogy. These cases were decided before the Fourth Amendment as such was held applicable to the states, . . . and thus rested only on general considerations of due process. . . . Whether the Court would now adhere to them must be regarded as questionable.

Id. at 583 (footnote omitted). *Accord,* Brooks v. Blackledge, 353 F. Supp. 955 (W.D. Va. 1973). *See also* United States v. Cotten, 471 F.2d 744, 748 n.11 (9th Cir. 1973)

is whether the rule can stand in light of the revolution in the notion of due process which has occurred since the *Frisbie* decision more than twenty years ago.

The *Ker-Frisbie* rule has been under attack especially since the Supreme Court's decision in *Mapp v. Ohio*,[63] which held that the fourth amendment's strictures, including the exclusionary rule,[64] were binding on the states. *Mapp* seemed to reject the rationale that convicting the guilty was more important than condemning and deterring illegal official misconduct.[65] Additionally, commentators have vigorously attacked the *Ker-Frisbie* rule ever since the *Frisbie* decision, primarily on grounds that it was inconsistent with the exclusionary rule.[66]

The change in attitude signaled by *Mapp* and other cases has been described as a "constitutional revolution."[67] It is no longer true that a fair trial is all that is necessary to satisfy the due process requirement. The government is now prevented from using the fruits of its unconstitutional conduct.

(recognized that the vitality of the doctrine may be in doubt, but nonetheless accepted it); United States v. Hamilton, 460 F.2d 1270 (9th Cir. 1972); United States *ex rel.* Calhoun v. Twomey, 454 F.2d 326 (7th Cir. 1971); Bacon v. United States, 449 F.2d 993 (9th Cir. 1971). *But see* United States v. Herrera, 504 F.2d 859 (5th Cir. 1974); United States v. Winter, 509 F.2d 975 (5th Cir. 1975); United States v. Quesada, 512 F.2d 1043 (5th Cir. 1975); *see also* In re David, 390 F. Supp. 52 (E.D. Ill. 1975); United States v. Marzeno, 388 F. Supp. 906 (N.D. Ill. 1975).

63. 367 U.S. 643 (1961).

64. In Weeks v. United States, 232 U.S. 383 (1914), the Court held that it was not permissible for the government to introduce evidence illegally seized in a federal criminal trial. Wolf v. Colorado, 338 U.S. 25 (1949), held that the *Weeks* rule was merely one of evidence, not a constitutional mandate and thus not obligatory on the states. *Mapp* overruled *Wolf*, holding that the exclusionary rule was applicable to the states under the fourteenth amendment's due process clause. "The cases [*Ker* and *Frisbie*] were decided before the Fourth Amendment as such was held applicable to the states, . . . and thus rested only on general considerations of due process. . . ." Brooks v. Blackledge, 353 F. Supp. 955, 957 (W.D. Va. 1973). *See* Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579, 599–601 (1968) [hereinafter cited as Pitler].

65. "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." 367 U.S. at 659. *See also* Virgin Islands v. Ortiz, 427 F.2d 1043, 1047 n.9 (3d Cir. 1973); in condemning the police conduct, the court suggested that "federal courts can impose higher standards of conduct on federal officers . . . through the exercise of [their] supervisory power." *See also* Pitler, *supra* note 64, at 600.

66. The *Ker-Frisbie* rule was generally attacked as inappropriate, but especially in federal courts where the Supreme Court may exercise its supervisory power to require lower courts to refuse jurisdiction. One commentator suggested that the practical basis for the *Frisbie* decision was the Court's reluctance to overturn a doctrine which was approved by an overwhelming number of states. Allen, *Due Process and State Criminal Procedures: Another Look*, 48 N.W.U.L. REV. 16 (1952); Scott, *Criminal Jurisdiction, supra* note 1; Pitler, *supra* note 64. *See also* Annot., 165 A.L.R. 947, 958–61 (1946).

67. Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971).

It may be argued that the erosion of *Frisbie* was evident two months prior to its pronouncement. In *Rochin v. California,*[68] the Supreme Court concluded that the manner by which the state obtained evidence leading to the defendant's conviction "shocked the conscience" and thus was a violation of due process.[69] In *Rochin,* police had entered the open door of defendant's apartment, burst through the bedroom door, and saw Rochin swallow something. Upon failing to force the defendant to cough up the swallowed items, the police delivered Rochin to a hospital, where, at their insistence, a doctor pumped his stomach. Two capsules containing morphine were recovered.[70] The Supreme Court, reversing the state courts' determination, held that the official conduct was so reprehensible that notions of due process and fundamental fairness required the exclusion of any evidence obtained thereby. The Court said that the Constitution required that convictions obtained by methods offending "a sense of justice"[71] must be overturned:

> Due process of law is a summarized constitutional guarantee of respect for those personal immunities which as Mr. Justice Cardozo twice wrote for the court are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105 . . . or are "implicit in the concept of ordered liberty." Palko v. State of Connecticut, 302 U.S. 319, 325. . . .[72]

In *Toscanino,* the defendant suffered similar brutality at the hands of the government. The government allegedly tortured Toscanino by knocking him unconscious, drugging him and interrogating him with the use of torture.[73] As stated in *Lujan,* "the particular circumstances of the abduction, if Toscanino's claims are true, represent government conduct appropriately condemned as most inhuman."[74] Accordingly, "there should be no constitutional difference between a trial using reliable evidence

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68. 342 U.S. 165 (1952).

69. *Id.* at 172.

70. *Id.* at 166.

71. *Id.* at 173.

72. *Id.* at 169.

73. 500 F.2d at 269–70. Toscanino's torture consisted of denial of sleep and food for days at a time; he was kept alive by intravenous feedings precisely equal to an amount necessary to sustain life. He was forced to walk a hallway for seven to eight hours at a time. When he would not answer questions, metal pliers were used to pinch his fingers, fluid was flushed into his eyes, nose and anal passage, and electrodes shooting electricity throughout his body were attached to his earlobes, toes and genitals. All of this allegedly took place in the presence of an official of the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs, and with the knowledge of the United States government and the United States Attorney for the Eastern District of New York. Finally, he was drugged and placed on a flight to New York and arrested on the aircraft as it passed over the United States.

74. 510 F.2d at 64.

brutally obtained and a proceeding against a defendant brutally obtained."[75] The court in *Lujan,* while accepting *Rochin*'s application to *Toscanino,*[76] distinguished the treatment of Lujan, stating that "the government conduct of which he complains pales by comparison with that alleged by Toscanino."[77] The court held that the vital elements of torture, brutality, terror or custodial interrogation present in *Toscanino* were crucial in the conversion of "an abduction which is simply illegal into one which sinks to a violation of due process."[78] On the other hand, it could be argued that the forcible abduction itself is sufficiently tainted with brutal governmental conduct to fit within the *Rochin* test.[79] If this is true, then *Lujan*'s interpretation of *Toscanino* is erroneous. As a result, the only consistent reading of *Rochin, Ker* and *Frisbie,* would confirm *Lujan*'s holding that a kidnapping and abduction standing alone are not so offensive and brutal so as to constitute a violation of due process.

But *Rochin,* to the extent that it interprets the advancing notions of due process to require scrutiny of the entire course of the proceedings that result in a convicton, appears to be inconsistent with the *Ker* and *Frisbie* holdings that a court will not look into the manner in which jurisdiction over the defendant was acquired.[80] In addition, due to the changing concept of due process, the focus is no longer solely on the integrity of the guilt-determinative process, which would limit scrutiny of pre-trial events to those which impair the ability of the court to reach a correct decision. In *Rochin,* the focus was solely on the conduct of the police.[81]

The *Rochin* principle of exclusion was extended to include all violations of the constitutional right guaranteeing freedom from unreasonable searches and seizures in the landmark case of *Mapp v. Ohio,*[82] which held the exclusionary rule applicable to the states through the due process clause of the fourteenth amendment:

> The effects of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and

75. *The Supreme Court, 1951 Term,* 66 HARV. L. REV. 89, 127 (1952) (footnote omitted). There is some question whether *Rochin* stands for the proposition that conduct as reprehensible as that shown leads to divestment of jurisdiction of the court to try the defendant, or whether the evidence so obtained is rendered inadmissible. If the latter, *Rochin* may easily be distinguished from *Toscanino,* on the ground that no illegally obtained evidence was used at Toscanino's trial. It is submitted that no such distinction may logically be made. Conduct so inhuman as that which occurred in *Toscanino* or *Rochin* should appropriately be condemned regardless of what advantages are obtained thereby.

76. 510 F.2d at 66.

77. *Id.*

78. *Id.*

79. *See* note 75 and accompanying text *supra.*

80. 342 U.S. at 169.

81. *Id.*

82. 367 U.S. 643 (1961).

> suffering which have resulted in their embodiment in the fundamental law of the land.[88]

The *Mapp* Court accepted the proposition that the *Weeks* exclusionary rule was not a rule of evidence but of constitutional origin[84] and rejected the holding in *Wolf v. Colorado*[85] that other means of protecting fourth amendment rights were adequate. *Mapp*, in supporting the exclusionary rule and recognizing that as a result of it "[t]he criminal is to go free because the constable has blundered," held that the imperative of judicial integrity outweighed this consideration.[86] As a result, the *Mapp* Court concluded that the due process clause cannot "be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment."[87] Therefore, it can be said that the exclusionary rule, focusing on the conduct of the government, has, in most instances, nothing whatever to do with the fair determination of guilt,[88] which is an apparent contradiction to the *Ker-Frisbie* approach. The exclusionary rule's purposes are to deter disregard of constitutional rights and protect the integrity of the courts.

While the *Mapp* principle is relatively clear, its effect on the vitality of the *Ker-Frisbie* rule is not. The desire to protect the integrity of the courts certainly extends to abductions in violation of law,[89] but the remedy

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83. *Id.* at 648, *quoting* Weeks v. United States, 232 U.S. 383, 393 (1914). The exclusionary rule was already binding on federal courts. It is *Mapp*'s expansion of the concept of due process which has direct bearing on *Toscanino*.

84. *Id.* at 643.

85. 338 U.S. 25, 30 (1949).

86. 367 U.S. at 659, *quoting from* People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926). Mr. Justice Brandeis in his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 471 (1928), agreed, stating:

> Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Id. at 485 (dissenting opinion).

87. 367 U.S. at 660.

> [If the exclusionary rule is not to be employed, an individual's] right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution.

Weeks v. United States, 232 U.S. at 393. *See also* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

88. Both *Mapp* and *Rochin* are examples of exclusion of completely reliable information. *See* note 45 *supra*.

89. "[C]onviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand." McNabb v. United States, 318 U.S. 332, 339 (1943). Mr. Justice Brandeis stated in his dissent in *Olmstead*:

> The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite

of "exclusion" of the defendant from a case because his arrival in the jurisdiction was irregular seems much more drastic than the exclusion of evidence. In effect, *Lujan* distinguished between illegal and unconstitutional governmental misconduct. One explanation for this distinction is the drastic remedy required if a constitutional violation is found.[90]

However, in the area of entrapment, courts have embraced just such a drastic remedy. Although the traditional basis for a dismissal of the indictment in an entrapment case is the lack of predisposition on the defendant's part to commit a crime,[91] there has been considerable support for the proposition that the proper basis for the defense is the illegal conduct of the police.[92] In the recent case of *United States v. Russell*,[93] the Supreme Court, while holding that the government activity involved did not amount to entrapment,[94] warned that:

> . . . [W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process

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the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. The rule is one, not of action, but of inaction. It is sometimes spoken of as a rule of substantive law. But it extends to matters of procedure as well. A defense may be waived. It is waived, when not pleaded. But the objection that the plaintiff comes with unclean hands will be taken by the court itself. It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself.

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously.

277 U.S. at 484–85 (footnotes omitted). *See also* Terry v. Ohio, 392 U.S. 1, 13 (1967).

90. *See* notes 100–16 and accompanying text *infra*. It is difficult to conceive that "simply illegal" conduct is not a "violation of due process." 510 F.2d at 66. In fact, the *Lujan* court failed to find a violation of any constitutional right. In order to do so, the court totally ignored discussion of the fourth amendment right of freedom from unlawful seizure of the person. The most logical explanation for the court's refusal to find any violation of a constitutional right was their aversion to the extreme remedy of divestment of jurisdiction. *Id.* at 68 n.9.

91. United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932).

92. *See* 356 U.S. at 382 (Frankfurter, J., concurring); 287 U.S. at 451 (Roberts, J., concurring).

93. 411 U.S. 423 (1973).

94. In *Russell*, the defendant was participating in an illegal drug manufacturing operation. The federal agent investigating the case infiltrated the operation, and agreed to supply an essential ingredient, which was legally obtainable but very difficult to find. When the ingredient was procured, the defendant used it to make the drug. In sum, there was no doubt that the government agent had not prompted an innocent person to commit a crime, but had simply supplied the tools. In upholding the conviction, the Supreme Court noted that the defense of entrapment was not based on the Constitution, but the inferred intent of Congress to refrain from punishing conduct that was not induced in the defendant's own mind, but instead at the behest of the government. 411 U.S. at 433.

> principles would absolutely bar the government from invoking judicial processes to obtain a conviction, . . .[95]

The Court's warning implies that the defendant's guilty predisposition may not preclude a finding of a due process violation, and therefore, the courtroom doors should be closed for purposes of conviction when the crime is the result of sufficiently outrageous and illegal police conduct.

Mapp and *Russell* indicate that the basis of the *Ker-Frisbie* rule has been at least partially eroded. In light of the shocking conduct involved in *Toscanino,* the decision in that case recognized this erosion and properly denied jurisdiction over the defendant on due process grounds. It may be that any abduction by government officials would be sufficiently "shocking" to deny jurisdiction.[96]

Nevertheless, a kidnapping without more is difficult to fit within *Rochin,* which held that police conduct which "shocks the conscience" is a violation of due process, since *Frisbie* itself was decided after *Rochin* and made no mention of the earlier decision.[97] More recent cases, such as *Mapp* and *Russell,* however, suggest that the Supreme Court's attitude toward "forcible abductions" has changed, and that very little may be left of the original *Ker-Frisbie* rule.[98]

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95. *Id.* at 431–32. In addition, *Russell* cited two lower court decisions which had found entrapment regardless of the defendant's predisposition in cases of governmental illegality. United States v. Bueno, 447 F.2d 903 (5th Cir. 1971); United States v. Chisum, 312 F. Supp. 1307 (C.D. Calif. 1970). 411 U.S. at 427–28. *See also* Scott, *Criminal Jurisdiction, supra* note 1, at 103.

96. This argument has been specifically rejected by two circuits. In Hobson v. Crouse, 332 F.2d 561 (10th Cir. 1964), the counsel for the defendant argued that the *Frisbie* rule had been impliedly overruled by *Mapp* and that accordingly "all 'shortcut methods of law enforcement' are forbidden." The court held that nothing in Mapp either impels or encourages "the bold step suggested by counsel." *Id.* at 561–62. In United States v. Cotten, 471 F.2d 744 (9th Cir. 1973), the court, as in the *Hobson* case, found nothing in *Mapp, Rochin* or Miranda v. Arizona, 384 U.S. 436 (1966), which implied that the expanded scope of protection afforded to accused persons by the fifth and fourth amendments would preclude trial of the accused by a court of competent jurisdiction.

97. The Supreme Court could have used the *Rochin* rationale in *Frisbie* seemingly because of the fact that some violence was perpetrated on Frisbie during his abduction. 342 U.S. at 520. This seems to indicate that, at the time, the Supreme Court had determined *Frisbie* to be consistent with *Rochin.* Evidently, then, *Ker* and *Frisbie* have been eroded due to the trend of due process cases subsequent to *Frisbie* such that the amount of force sufficient to violate due process may have decreased significantly.

98. This was apparently the conclusion of the Second Circuit in *Toscanino* in denying the jurisdiction of the district court over the defendant if the facts alleged were proved. The court did not dwell on the presence of torture, and, logically, the post-seizure torture did not bear any causal connection with the obtaining of jurisdiction over Toscanino. Nevertheless, the *Lujan* opinion distinguished *Toscanino* because of the presence of torture in the earlier case. For the same reading of *Toscanino, see* United States v. Marzano, 388 F. Supp. 906 (N.D. Ill. 1975).

Lujan's reading of *Toscanino* is improbable since the *Toscanino* court rested its decision not only on the due process clause but also on the fourth amend-

THE APPROPRIATE REMEDY FOR A DUE PROCESS VIOLATION

Another important question raised by the *Toscanino* decision is the remedy to be applied once a due process violation is found. In *Toscanino,* the court simply mandated divestment of jurisdiction over the person upon finding a due process violation, and did not consider the full implications of this remedy.[99] The full consequences of the remedy of divestment of jurisdiction remain to be determined. The court might send the defendant back to the jurisdiction from which he was abducted and then permit commencement of formal extradition proceedings. In the case of an interstate abduction, the court, upon returning the defendant, may request his rendition; to obtain the same results, the court can simply set him free, give him a head start and then permit pursuit. In other words, if the presence of the defendant can be obtained independently of the prior illegal seizure, then there would be no need to prohibit a trial of the defendant. This would be consistent with the exclusionary rule applying to illegal seizure of evidence, which permits the use of evidence if it is acquired independently of police misconduct.[100]

It may be doubted, however, whether any arrests following an illegal abduction would be wholly separate and unaffected by the taint of the original kidnapping. This leads to the conclusion that a finding of an unconstitutional abduction must result in most cases in complete immunity from prosecution of the defendant.[101] If this were not the case, the divestment would simply be dictating an unreasonable waste of time for the government with no certain benefit to the defendant, thus making the

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ment. 500 F.2d at 275. Discussion of the fourth amendment would have been immaterial to the interpretation of the *Toscanino* decision given by the *Lujan* court. Moreover, it is difficult to maintain that the true basis of the *Toscanino* decision was the presence of torture, because the court phrased the issue in terms of kidnapping and abduction and not governmental brutality. This seems especially noteworthy, since the court in *Toscanino,* in attempting to distinguish *Ker* and *Frisbie* in order to avoid a strict overruling of those decisions, failed to mention this basic distinction.

Since the *Toscanino* decision was handed down, the Supreme Court has undercut some of the force behind the argument that *Ker* and *Frisbie* no longer represent the majority view on the Court. In Gerstein v. Pugh, 420 U.S. 103 (1975), the Court in dictum cited both cases with apparent approval. *Id.* at 119.

99. 500 F.2d at 275.

100. The basis for requiring an independent source is that the court should not permit what can not be legally done in one step to be done in two. In Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), the Court did not permit the government to subpoena from the victim of an unlawful search and seizure the very documents illegally seized and then returned pursuant to court order. Accordingly, it would seem, for example, that the government should not be permitted to return Toscanino to Uruguay and then demand his extradition.

101. If there is no truly independent source, the immunity must encompass all illegal conduct prior to the divestment over which that court would have jurisdiction.

exclusionary rule a mere procedural device rather than a real deterrent to police misconduct, and a means of protecting "judicial integrity."[102]

The court in *Lujan* accepted the conclusion that application of the exclusionary rule to require divestment of jurisdiction would usually confer complete immunity on the defendant.[103] In determining if complete immunity is the proper remedy, the competing interests of the public and those of the individual defendant must be balanced. Society's interest may be best served by allowing the defendant to go free as a means of protecting judicial integrity and thus everyone's individual liberties. However, this interest should be balanced against the principle that the guilty should be punished to maintain the public confidence which would be betrayed when an obviously guilty criminal escapes punishment.[104] The former argument has prevailed in cases involving illegal searches and seizures[105] and electronic surveillance.[106] There are important distinctions between the application of the rule in cases of wiretapping and searches and seizures and its application to personal jurisdiction. The issue in previous cases involving the exclusionary rule concerned the admissibility of evidence.[107] Excluded evidence went to proving the defendant's guilt or innocence. In cases of abduction of defendants, the "exclusion" is immaterial to proof of guilt or innocence. Only the ultimate power to convict was procured by the illegal conduct, not the means of establishing guilt or innocence. The police, however, have profited by their illegal kidnapping just as in the case of illegally seized evidence. Since the rationale of the exclusionary rule is deterrence of police misconduct rather than simply a notion of fairness of the outcome of the trial, the exclusionary remedy should apply. It is true that application here is a more severe remedy than in cases of exclusion of evidence, but according to *Toscanino*, in those cases in which mere evidence was excluded it was unnecessary to:

> invoke any other sanction to insure that an ultimate conviction would not rest on governmental illegality. Where suppression of evidence

102. Coolidge v. New Hampshire, 403 U.S. 443, 448 (1970); Terry v. Ohio, 392 U.S. 1, 12 (1967).

103. This important conclusion was relegated to a discussion in a footnote. 510 F.2d at 68 n.9.

104. *See* People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926). *See also* McNabb v. United States, 318 U.S. 332 (1943); Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A.J. 479 (1922).

> No one can deny either the inherent justice of bringing criminals to trial or the importance of upholding the integrity of state prohibitions of criminal conduct, but to encourage law enforcement officers to violate the law themselves is hardly a sound means of effectuating these desirable ends.

Note, *Criminal Law: Personal Jurisdiction Obtained by Kidnapping*, 5 U. FLA. L. REV. 434, 436 (1952) (footnote omitted).

105. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

106. Katz v. United States, 389 U.S. 347 (1967).

107. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Silverman v. United States, 365 U.S. 505 (1961).

> will not suffice, however, we must be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct and *when an accused is kidnapped, tortured and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct.*[108]

The use of an exclusionary rule to reverse convictions because jurisdiction has been unlawfully obtained must make theoretical sense in terms of deterring inhumane or otherwise illegal conduct. In evaluating the remedy, however, it is necessary to draw a line where logic interferes with the criminal process without any meaningful gain to society. In other words, perhaps other direct methods of dealing with the shocking conduct of the police would be sufficient and thus the severe remedy of exclusion and immunity from prosecution could be avoided.

Direct methods of preventing illegal police conduct have proved largely illusory.[109] One direct remedy available is disciplinary action by the state against the police officers, including prosecution of the police officer for a criminal abduction. But as Mr. Justice Murphy said in *Wolf v. Colorado:*

> Self scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his Associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.[110]

Civil actions in most cases are also fruitless. While the criminal defendant might recover against a police officer, the officer's economic situation prevents, in most instances, collection of a large judgment.[111] A suit against the offending state or municipality usually is prohibited on grounds of sovereign immunity.[112] Therefore it is evident that direct remedies provide no real benefit for the criminal defendant; the result is a lack of incentive on the part of the police to refrain from violating individual liberties.

Perhaps an exclusionary rule is unnecessary because kidnapping of criminal defendants may not be a very serious problem. The court in

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108. 500 F.2d at 275 (emphasis added).

109. *Illegal Abduction, supra* note 1, at 295.

110. 338 U.S. 25, 42 (1949) (dissenting opinion). *See* Plumb, *Illegal Enforcement of the Law,* 24 CORNELL L.Q. 337, 388 (1939).

111. L. ORFIELD, CRIMINAL PROCEDURES FROM ARREST TO APPEAL 28 (1947); Hall, *The Law of Arrest in Relation to Contemporary Social Problems,* 3 U. CHI. L. REV. 345 (1936) [hereinafter cited as Hall, *The Law of Arrest*].

112. Hall, *The Law of Arrest, supra* note 111, at 348. *See also* 16 E. MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 53.80e (3d ed. 1963). The reluctance of a civil jury to award damages to a convicted defendant also would go a long way toward defeating the remedy.

In People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955), the Supreme Court of California concluded that direct criminal, administrative and civil remedies fail completely to secure compliance with the constitutional provision and as a result adopted the exclusionary rule. According to *Mapp,* the experiences of California were shared by those of other states. 367 U.S. at 652.

Lujan, in holding that divestment of jurisdiction was unnecessary in cases of ordinary illegal conduct, stated that "the financial cost of the operation, the possibility of alienating other nations, and the risk that the kidnappers would be prosecuted in a foreign territory for their offenses suggest that the likelihood of numerous violations is not real."[113] The court stated that if this assumption should prove ill-founded, its conclusions as to the lack of need for application of the exclusionary rule to cases of abduction unaccompanied by torture or brutality might be reconsidered.[114]

As previously noted, however, according to numerous reports, kidnapping and abduction have greatly increased as a method of combatting drug conspiracies.[115] The cost, though high, has not been prohibitive in worldwide drug conspiracies, as evidenced by the efforts of the government to end the conspiracy in which both Toscanino and Lujan allegedly participated. Even if the cost is prohibitive in most instances, constitutional rights should not be dependent upon how "big" a crime is involved. Finally, the possibility of alienating other nations is remote, since in most cases the foreign government cooperates or acquiesces in the kidnapping. It is therefore clear that a judicial solution to the problem is necessary, and divestment of jurisdiction seems to be the only remedy, although its severity indicates that it should be used sparingly.[116]

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113. 510 F.2d at 68 n.9.

114. *Id.* Furthermore, any such discussion of the exclusionary rule simply speaks to the remedy, and is irrelevant to whether a constitutional right was violated. This indicates that perhaps the court did not wish to declare that Lujan's treatment violated his due process rights because they did not wish to divest the court of jurisdiction.

115. *See* note 1 *supra.*

116. It is important to determine exactly what constitutional grounds are sufficient for the divestment of jurisdiction. The court in *Toscanino* did not clearly base its decision on the due process clause; the fourth amendment was also mentioned briefly. *See* 500 F.2d at 275.

If the exclusionary rule as applied to divestment of jurisdiction is based upon the fourth amendment rather than a violation of due process, then the same standards used to exclude evidence under the fourth amendment should be applied to the exclusion of jurisdiction. The standard under the fourth amendment includes errors in judgment as well as blatantly illegal conduct of the police. Applying this standard, irregularities unaccompanied by "outrageous" conduct in extradition as well as ordinary illegal arrests unaccompanied by any "fruits" of the illegality would result in divestment of jurisdiction. The maze of problems thus created by the fourth amendment analysis of the *Toscanino* decision largely accounted for the severe limitation of the decision in *Lujan.* By basing *Toscanino* solely on the due process clause, different standards could be applied than for exclusion of evidence under the fourth amendment thereby preventing any extension of the *Toscanino* result to ordinary illegal arrests unaccompanied by police brutality. In light of the *Lujan* decision, such an extension is now precluded, at least in the Second Circuit.

Toscanino as interpreted by *Lujan* would arguably preclude a federal court from exercising jurisdiction over any defendant whose arrest was associated with gross police misconduct, whether or not an abduction was involved. But the court stated in *Toscanino*:

> [W]e view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the

INTERNATIONAL LAW CONSEQUENCES OF ABDUCTIONS

A second theory advanced for the denial of jurisdiction in *Toscanino* was the alleged violation of international law.[117] This theory was also alluded to in *Lujan,* but neither case truly came to grips with the issue of whether a federal court must divest itself of jurisdiction solely because the defendant was brought before the court as a result of a violation of international law.[118]

That the court in *Toscanino* found a violation of international law in the kidnapping and abduction of Toscanino distinguishes the case from *Ker, Frisbie* and *Lujan.*[119] In *Ker,* the only revelant treaty in effect at the time was the extradition treaty between the United States and Peru. An extradition treaty merely gives the parties a right to the surrender of a fugitive upon proper request. Unless an extradition treaty specifically eliminates other methods of apprehension, which was not true in the treaty involved in *Ker,* failure to request extradition and a subsequent abduction is not a violation of the treaty. Accordingly, the Court in *Ker* held that the defendant's kidnapping was not in violation of the Peruvian extradition treaty.[120]

Toscanino involved an abduction which was allegedly in direct violation of two international treaties which secured Uruguay's territorial sovereignty, the United Nations Charter and the Charter of the Organization of American States.[121]

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government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights.

500 F.2d at 275. *See* LaFrance v. Bohlinger, 499 F.2d 29 (5th Cir. 1974), where the court recognized the applicability of the *Toscanino* rationale to police conduct resulting in a coerced confession.

117. 500 F.2d at 276.

118. *Toscanino* hints that such a violation would be sufficient to justify divestment of jurisdiction, but couches much of its discussion of international law in terms of due process, thereby obscuring the issue of whether a violation of international law alone is sufficient. The requirements necessary to establish a violation of international law were discussed in *Lujan,* but since the court found no violation, no determination as to the consequences of a breach was necessary. *See* 510 F.2d at 68.

119. *See* notes 23–32 and accompanying text *supra.*

120. In further explanation of its finding that no violation of a treaty occurred, the court in *Ker* stated that where the defendant's removal is extra-legal, the defendant cannot raise an issue of the illegality in his removal unless the language of that treaty supports a construction that citizens of each country have a right of asylum in the other, including the right of a fugitive to be free from acts of force. 119 U.S. at 441.

121. U.N. CHARTER art. 2:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

. . . .

(4) All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence

A factual situation analogous to that in *Toscanino* was presented in *Cook v. United States*.[122] In *Cook*, the United States seized a British vessel in violation of an Anglo-American shipping treaty. The Court divested itself of jurisdiction over the ship because under the treaty, the United States lacked the power to seize and thereby subject the ship to its laws.[123] Therefore, a treaty by which the United States disclaimed any authority to seize persons doubtless would similarly divest an American court of jurisdiction.[124] The court in *Cook* distinguished *Ker* on this ground:

> The objection to the seizures is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority. . . . Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.[125]

Since *Toscanino* involved direct violation of international treaties securing Uruguay's sovereignty, *Cook* indicates that a federal court would have no power to try Toscanino unless the abduction was not an unlawful invasion of the territorial sovereignty of Uruguay.[126]

> of any state, or in any other manner inconsistent with the Purposes of the United Nations.

O.A.S. CHARTER art. 17:

> The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

122. 288 U.S. 102 (1933).

123. *Id.* at 121. The *Cook* case followed the decision in United States v. Rauscher, 119 U.S. 407 (1886). *Rauscher* held that the circuit court acquired jurisdiction by way of an extradition treaty to try an extradited defendant only for the crime for which he had been extradited. Under *Ker*, if the defendant had been abducted, he could have been tried for any offense and the United States would not have been in violation of any treaty. But, once the treaty was invoked, the United States had jurisdiction only according to the terms of the treaty.

124. *See* note 140 and accompanying text *infra*.

125. 288 U.S. at 121–22.

126. Not only must the court asserting its authority have jurisdiction over the person, but also over the crime, in order for a prosecution to be within the bounds of international law. *See* RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 8 (1965):

> Effect of Lack of Jurisdiction
>
> Action by a state in prescribing or enforcing a rule that it does not have jurisdiction to prescribe or jurisdiction to enforce, is a violation of international law, . . .

The United States could exert jurisdiction over a crime committed abroad based on the protection of a state, *id.*, § 18, or universal interest, *id.*, § 34. Conduct outside its

Although protection of a state or universal interest can be a basis of jurisdiction,[127] the United Nations Security Council, in its debates concerning Israel's kidnapping of Adolph Eichmann from Argentina, rejected an interest in apprehending criminals as a basis for acquiring jurisdiction over the person, and thus a basis for invading a country's territorial sovereignty.[128] Additional support for the contention that abduction violates the territorial sovereignty of a nation is found in the international custom of return of the person upon demand by the invaded state.[129]

The requirement of "demand" on the part of the invaded state for the return of the abducted person was viewed as crucial in *Lujan*.[130] Lujan alleged, as did Toscanino, that his abduction violated the provisions of the United Nations Charter and the Charter of the Organization of American States securing the sovereignty of member states. The court held that Lujan's failure to allege that either Argentina or Bolivia protested or objected to his abduction was fatal to his reliance on those charters.[131] In other words, the *Lujan* court held that absent an objection by the injured state, the individual has no standing to protest the violation of international law. The violated provisions of the charters were "designed to protect the

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territory that threatens the security of a state or the operation of its governmental functions can be deemed a sufficient state interest to give the United States jurisdiction to prescribe a rule of law attaching legal consequences to such conduct. *See generally id.*, § 33 (provided the conduct is generally recognized as a crime under the laws of States that have reasonably developed legal systems). *See id.*, § 34, at 97 (universal interest in halting traffic in narcotics). On this basis, the United States could be deemed to have a sufficient interest to acquire jurisdiction over the crime of conspiracy to import narcotics although no act of Toscanino took place in the United States.

127. *Id.*, §§ 18, 34.

128. *See* 500 F.2d at 277. In response to a letter from the Representative of Argentina to the President of the United Nations Security Council (U.N. Doc. S/4336 (June 15, 1960)), the Security Council resolved that the Eichmann kidnapping was a violation of Argentina's sovereignty:

> The Security Council . . .
>
> (1) Declares that acts such as that under consideration, which effect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security;
>
> (2) Requests the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law.

U.N. Doc. S/4349 (June 23, 1960).

Israel was not forced to return Eichmann, as negotiation between the two countries resulted in Argentina waiving its demand for his return. 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1109 (1968).

129. *See, e.g.*, the case of Blatt and Converse, [1911] 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 309 (1941) [hereinafter cited as HACKWORTH]. In the Cantu Case, [1914] 2 HACKWORTH 310, the United States protested the violation of its territorial sovereignty by the Mexican government in seizing a Mexican fugitive. Return of the abducted person resulted. *See* The Vincenti Affair, [1920] 1 HACKWORTH 624 (1940).

130. 510 F.2d at 67.

131. *Id.*

sovereignty of states, and it is plainly the offended states which must in the first instance determine whether a violation of sovereignty occurred, or requires redress."[132]

According to the *Restatement (Second), Foreign Relations Law of the United States,* whether or not a right of a sovereign is to be enforced at all is within the province of the head of state.[133] The decision to protest a violation is made not only in light of the legal issue, but also in light of other circumstances, including political considerations. This principle is true even when the particular provisions in the treaty establish certain benefits for individuals.[134] The individual's rights are viewed as only derivative of the state's; if the state does not protest, then the individual has no redress.[135]

Although it seems to be clearly established that it is the right of the sovereign that is violated, a state may provide a remedy under its domestic laws to give effect to a rule of international law. If no such domestic law is in effect, then the particular international rules asserted must be self-executing to be effective.[136] It is abundantly clear from the language in

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132. *Id.*

133. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 163, comment *d* (1965).

134. Many international treaties are entered into to secure rights to the nationals of the affected states. Examples of such treaties are in the areas of commerce and navigation. For example, a navigation treaty might secure fishing rights. *Id.*, § 115, comment *e.*

135. According to the Supreme Court of Israel, dismissing Adolph Eichmann's claim of lack of jurisdiction due to the violation of international law, the aggrieved state may condone the violation of its sovereignty and waive its claims, including the claim for the return of the offender to its territory and such waiver may be explicit or by acquiescence. Any waiver remedies the violation of international law. 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1109 (1968). Another example of this principle is found in the refusal of the Permanent Court of Arbitration at the Hague to order the return to France of an escaped prisoner of the British. The court's refusal was based on the fact that a French police officer had returned the prisoner to the British and thus had waived any objection to a violation of French sovereignty. Savarkar's Case, [1910] 2 HACKWORTH 319 (1941). *See also* Fiocconi v. Attorney General of the United States, 462 F.2d 475 (2d Cir.), *cert. denied,* 409 U.S. 1059 (1972); 4 J. MOORE, DIGEST OF INTERNATIONAL LAW § 603 (1906).

136. A self-executing treaty has been defined as one "which prescribes by its own terms a rule of the Executive or for the courts or which creates obligations for individuals enforceable without legislative implementation." *See* Evans, *Self-Executing Treaties in the United States of America,* 30 BRIT. Y.B. INT'L L. 178, 185 (1953). A treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

To be considered self-executing, the treaty must be sufficiently explicit without additional implementing statutes, Bowater Steamship Co. v. Patterson, 303 F.2d 369, 378 (2d Cir.) (dissenting opinion), *cert. denied,* 371 U.S. 860 (1962). In Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952), the court found the preamble and article 1 of the U.N. Charter not to be self-executing, as they stated general purposes and objectives and did not purport to impose legal obligations on the individual mem-

both treaties[137] that further domestic legislation would be necessary in order to require that divestment of jurisdiction over the person result from a violation of territorial sovereignty by abduction unaccompanied by protest from the invaded state. Therefore, it is clear that in the absence of a demand by the injured states for the redress of the asserted violation of the treaties, the court in *Lujan* was correct in holding that the defendant had no standing to protest his abduction based on any violation of the charters. In *Toscanino,* however, it was alleged that:

> the Uruguayan government claims that it had no prior knowledge of the kidnapping nor did it consent thereto and had indeed condemned this kind of apprehension as alien to its laws.[138]

The *Lujan* court noted that "to support this claim, Toscanino would have to prove that the Uruguayan government registered an official protest with the United States Department of State."[139]

The *Toscanino* court did not answer the question as to whether the violation of international treaties coupled with an appropriate protest would, without more, require divestment of jurisdiction. However:

> To hold otherwise would go far to nullify the purpose and effect of the salutary principle, well established in Anglo-American jurisprudence, that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[140]

CONCLUSION

There is no doubt that the *Lujan* decision sharply curtailed the implications of *Toscanino,* which was the first case to deny the applicability of the *Ker-Frisbie* rule to illegal abductions. *Lujan* distinguished between merely "illegal" and "unconstitutional" government misconduct. Yet to question that admittedly "illegal government conduct"[141] is a denial of

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ber nations or to create rights in private persons. It was clear that future legislation was contemplated to accomplish the declared objectives.

137. *See* note 121 *supra.*

138. 500 F.2d at 270 (quoting from Toscanino's petition).

139. 510 F.2d at 67 n.8. Exactly what form of protest is necessary to afford a defendant standing to invoke a violation of international law is unclear. *Lujan* implied that a formal protest accompanied by demand for return was probably sufficient. Since any protest of the violation of territorial sovereignty would preclude establishment of acquiescence by the injured nation, such a protest should be considered sufficient.

140. Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law,* 28 AM. J. INT'L L. 231, 245 (1934).

141. 510 F.2d at 66. The element of torture, so heavily relied upon in *Lujan* as the basis for the *Toscanino* decision, had nothing whatever to do with an illegal arrest; the court did not acquire jurisdiction as a result of the torture in *Toscanino.* Therefore, the illegal arrest, though not in any sense a merely technical violation, was immaterial to the question of jurisdiction. The sole focus was the reprehensible conduct of the government, which the Court of Appeals felt required an emphatic judicial response.

due process of law seems a perversion of those very words. Intellectually, it is difficult to justify the holding in *Lujan* that the government may kidnap and forcibly abduct a defendant to acquire jurisdiction over him so long as they are not "too rough" in accomplishing their goal. Perhaps, in a subsequent case, the Second Circuit will partially remedy this situation by declaring an international abduction, properly asserted so as to amount to a violation of international law, as sufficient to divest the court of jurisdiction. But as the law presently stands, at least in the Second Circuit, if one is kidnapped by law enforcement officers with the intent to abduct him into the jurisdiction to face trial, he should give his captors a physical fight with the hope that the government's response to his actions will be considered sufficiently outrageous to divest the court of jurisdiction. Such a result reduces the law to a mere game of "cops and robbers."